

Singh (Migration) [2022] AATA 3355 (29 September 2022)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mr Vijay Pal Singh Mr Fateh Singh Ms Gurpreet Kaur
REPRESENTATIVE:	Mr Jujhar Bajwa (MARN: 0742209)
CASE NUMBER:	1916309
HOME AFFAIRS REFERENCE(S):	BCC2017/3388014
MEMBER:	Stephen Witts
DATE:	29 September 2022
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the applications for Regional Employer Nomination (Permanent) visas for reconsideration, with the direction that the first named applicant and the other applicants meet the following criteria for Subclass 187 - Regional Sponsored Migration Scheme visas: • Public Interest Criterion 4020 for the purposes of cl 187.213 of Schedule 2 to the Regulations

Statement made on 29 September 2022 at 11:37am

CATCHWORDS

MIGRATION – Regional Employer Nomination (Permanent) (Class RN) visa – Subclass 187 (Regional Sponsored Migration Scheme) – bogus document – false or misleading information – skills for the nominated occupation – Pastry Cook – Certificate IV in Patisserie – enrolment cancelled – completion letter issued by education provider – unprofessional and incompetent conduct on education provider’s part – decision under review remitted

3.

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cl 187.213; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 4 June 2019 to refuse to grant the applicants' Regional Employer Nomination (Permanent) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicants applied for the visas on 17 September 2017. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl 187.213 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the delegate contended that the applicant provided a bogus document or information that is false or misleading in a material particular in relation to the application for the visa.
6. The primary applicant, Mr Vijay Singh, appeared before the Tribunal on 29 September 2022 to give evidence and present arguments.
7. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
8. The applicants were represented in relation to the review.
9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration. This

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 187.213 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
11. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver

does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

12. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
13. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
14. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
15. The Tribunal has considered all the material before it including evidence provided prior to the hearing and evidence given at the hearing.
16. The Tribunal notes that it has been provided with a copy of the relevant delegate's decision dated 4 June 2019. In this decision the delegate contended that the applicant had provided a bogus document or information that is false or misleading in a material particular in relation to the application for the visa. Specifically, the delegate contended that the applicant provided false or misleading information in his visa application regarding his skills for the nominated occupation of pastry cook as described in ANZSCO code 351112.
17. The Department contended that at the time of application on 17 September 2017 the primary applicant stated in his online visa application that he holds a certificate IV level qualification in Patisserie which he obtained from the Institute of Hotel Management Australia. It was asserted by the delegate that the applicant provided a copy of the certificate and a letter from the education provider stating that he commenced the course in December 2014 and completed all the required units by November 2015. The Department further contended that the applicant's enrolment with the education provider for this course (COE 6D8C 5184) was cancelled and that the applicant ceased studies and withdrew from the course; and that therefore there was false or misleading information provided on this visa application because the applicant claimed to hold a qualification for the nominated occupation which was found to be not the case.
18. The Department further contended that the applicant responded to a natural justice letter sent to him on 27 May 2019 by providing a letter dated 21 May 2019 from Westpac bank indicating that a debit was made to the account for \$1000 on 10 March 2016; and that also provided were bank statements where it was noted there was a debit entry indicating a payment made for an Australian college fee for \$1000.

19. The delegate asserted that it checked this information and that the \$1000 payment referred to falls outside of the course period up to 20 November 2015 and that therefore it is less likely that the payment was made for the course referred to; that neither the bank entry or the reference to a college fee specified the education provider; and that in any case payment to an education provider in itself does not establish the applicant completed a course of study.
20. The delegate also contended that there were no compelling circumstances that affect the interests of Australia or no compassionate or compelling circumstances that affect interest of an Australian citizen, permanent resident, or eligible Australian or New Zealand citizen, that justify waving the considerations of PIC 4020.
21. The Tribunal notes that evidence was provided to it by the applicant prior to the hearing. This included a statutory declaration from the applicant stating that he did complete a certificate IV level qualification in patisserie and that he submitted all his assignments and completed the required units of training and that he had *"no idea about the cancellation of my COE"*. He also stated that *"I couldn't know it was cancelled if the administration won't inform me. It is in administration task and I have had no control over it."* He also stated that an ex-director of the Institute of Hotel Management (IHMA) Nasir Hayat, stated that a certificate was issued for his attendance. He further stated that even if his certificate of enrolment was cancelled, he could complete a certificate without an enrolment if it fulfils the course requirements. He further stated that he has never provided any fraudulent documents to the Department and the certificate was issued by the IHMA. He also stated that he received a letter from ASQA stating that he was enrolled in this course and that he has successfully met all requirements.
22. The Tribunal notes that a statutory declaration was also provided by Nasir Hayat, ex-Director of IHMA stating that the applicant was a full-time student, that it came to his attention that the Department has contended that it received adverse information regarding the applicant's enrolment having been cancelled by IHMA, and that *"it may have happened due to any system error or administration mistake"*. He also stated that a completion letter was issued by the organisation based on the applicant's attendance of classes and that the organisation *"will never issue a certificate to a student without their satisfactory course completion."*
23. The Tribunal further notes that also provided was a bank statement and receipt from Westpac, a completion letter for a certificate III level qualification in food processing, material regarding diploma level study in marketing and other material.
24. The Tribunal notes that the applicant also provided a statement from the applicant's representative dated 22 September 2022 stating that it is false that the applicant did not complete his qualification and that he did finish his studies, that the applicant *"was unaware of the cancellation and continued studying as he would normally"*, that the education provider did not inform him of the cancellation and allowed him to keep studying and after he completed his education he received a positive skills assessment outcome from the relevant assessing authority. It was further stated that *"he only came to know about the cancellation after he filed for RSMS visa. He received a letter from the Department which explained his COE was cancelled while he was studying"*. It was further stated that the director of the College referred to above stated that it may have been a system error or administration mistake. Further information was also provided regarding bank transfers.
25. It was further stated that if the applicant's intentions were malicious then he would not be providing evidence, that he is not at fault as he was not informed of his confirmation of enrolment cancellation, that he was unaware of this, that he has been working hard in Australia, that he is working as a pastry cook and that he has always cooperated with the Department. It was also stated that he did receive a positive assessment of his skills and

that *“the onus of the error lies on the education provider as they did not inform him of the cancellation”*.

26. At the hearing, the Tribunal had discussion with the applicant regarding his application.
27. The applicant stated that he first arrived in 2009 on a student visa and successfully completed a certificate III level qualification in patisserie, a diploma level qualification in management, and an advanced diploma level qualification in management prior to then receiving a second student visa and studying for the certificate IV level qualification in patisserie referred to in this matter, and also completing a diploma level qualification in marketing. He stated he worked for some time in a café, and also as a courier driver, and that he has now worked as a pastry cook full-time for several years. He stated that he has two children here in Australia with his spouse, one of which is five years old and the other is 10 months old. He stated that he applied for this visa in 2017 under the impression that he actually did successfully complete this course in November 2015 and that the first he learnt that his course had in fact been cancelled by the Institute in 2015 was when he was informed of such by the Department.
28. The Tribunal had a detailed discussion with the applicant and the applicant's representative the circumstances of this case noting that amongst other things a letter and other material was provided dated 27 June 2019 from the Australian Skills Quality Authority stating that the applicant had enrolled in a Certificate IV in Patisserie at the Institute of Hotel Management Australia, its legal name being the Australian Institute of Trades Proprietary Limited, acting as a trustee, and that the applicant successfully completed this qualification on 20 November 2015. The applicant also provided other evidence that in fact he did attend classes and did complete assignments and did practical work at the facility of the training centre over a period of time, for this qualification, and that he did receive a genuine certificate that he had completed this course which was issued on 28 April 2016 and which was signed by the then Executive Director of the organisation and also the director, now an ex-director, referred to above. The Tribunal had a detailed discussion with the applicant regarding these circumstances and found the applicant's contention that he was not aware of the cancellation, which he acknowledged may have actually happened, and that he did attend classes and do assignments which he was assessed by the same education Institute that actually cancelled his enrolment in the first place prior to issuing him with a certificate which has now been accepted by an assessment authority.
29. The Tribunal finds that it is most likely that the applicant did do this course and did complete it successfully and was unaware when he applied for this visa in 2017 that in fact the Institute had issued him with a certificate which he did study for, at the same time as it had cancelled his COE without telling him. The Tribunal notes that the Department was acting in good faith when it made a decision based on the proposition that his enrolment was cancelled but that subsequent investigations would reveal that in fact the applicant did undertake this course, did successfully complete it, and was recognised as having achieved that. The Tribunal finds that this Institute, now apparently out of business, has engaged in conduct which is totally unprofessional and incompetent.
30. On that basis the Tribunal finds that the applicant did not knowingly or intentionally provide any bogus or misleading information to the Department and was acting under the reasonable contention when he applied for his visa in 2017 that he in fact did graduate from this Institute and achieve patisserie qualifications in November 2015 which he has continued to practice having now worked as a pastry cook for several years the last two of which are at the same employer.
31. As above the Tribunal finds that there is evidence before it that the applicant did not give, or caused to be given, to the Minister, an officer, the Tribunal, or a relevant assessing authority,

information that is false or misleading in a material particular as defined in PIC 4020(5), that is information that is false and misleading at the time it is given, and relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information in relation to the visa application or a visa held in the 12 months before the visa application was made.

32. Therefore, the applicant does meet PIC 4020(1).
33. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl 187.213.
34. The Tribunal further notes that as the primary applicant does meet the criteria for the grant of the visa that the secondary applicants also meet the criteria for the grant of the visa.

DECISION

35. The Tribunal remits the applications for Regional Employer Nomination (Permanent) visas for reconsideration, with the direction that the first named applicant and the other applicants meet the following criteria for Subclass 187 - Regional Sponsored Migration Scheme visas:
 - Public Interest Criterion 4020 for the purposes of cl 187.213 of Schedule 2 to the Regulations

Stephen Witts
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...